SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-144

EFRAIN T. SUAREZ, et al.,

Petitioners,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida, et al.,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

This Brief is submitted on behalf of the following Respondents in this cause:

(a) Dade County, Florida, a political subdivision of the State of Florida.

(b) Richard E. Gerstein, State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida.

(c) Michael Daugherty, a Special Investigator employed in and by the office of the aforesaid State Attorney.

(d) Barbara Williams, a policewoman who in this case received her instructions from the aforesaid State Attorney.

(e) Myrtle Ellison, a policewoman who in this case received her instructions from the aforesaid State Attorney.

The last four named Respondents will be referred to throughout this Brief as the County Officials.

STATEMENT OF THE CASE

Although the basic physical facts recited in the Statement of the Case contained in the Petition for Writ of Certiorari are factually correct, the recitation also contains such emotionally charged adjectives and adverbs that it cannot be regarded as a straightforward and objective narrative of the circumstances. The Respondents submitting this Brief would therefore call the Court's attention to the clear, objective, and simple statement of the factual circumstances set out in Judge Tuttle's opinion written without dissent for the United States Court of Appeals for the Fifth Circuit. They respectfully request that the statement of the case contained in that opinion be regarded as their statement of the case for the purposes of this Brief. For the convenience of the Court the aforesaid statement of facts is set forth below:

> We here deal with the final chapter in a tale of three lawsuits arising in the Southern District of Florida, as a result of which the original plaintiff, the appellant here, has, by action of the United States Tax Court, received full relief in the matters originally litigated but who now complains that the trial court declined to award him his attorney's fees.
>
> Suarez has been attempting for some five years to prevent the Internal Revenue Service from utilizing copies of records which had been seized from his office on January 3, 1964 by police officers of Dade County, Florida and which had been used to produce his conviction for performing illegal abortions. The first of these efforts

was made in connection with his filing a petition for release from the state court conviction by writ of habeas corpus on the ground that his conviction had been obtained by the use of the illegally seized records. Asserting that the state officials had furnished copies of the records to the Internal Revenue Service agents, he amended his petition for habeas corpus to seek an injunction against the IRS officials. He subsequently filed a second civil suit seeking an injunction against the use of evidence, based on alleged violations of his Fourth and Fifth Amendment rights.

Following the grant of the writ of habeas corpus by the federal court, Suarez was released from his state conviction and was not brought to trial a second time. Thereupon the state court issued an order directing all officers, both state and federal, to surrender the records and all copies thereof to the plaintiff. Upon the failure of the Internal Revenue officials to return the copies that they possessed criminal contempt proceedings were filed in the state court against the federal officials. This case was removed to the federal court, and this became the third prong of the litigation which we now bring to a close. Claims for damages against the state and federal officials for their illegal use of the evidence have been abandoned by the appellant.

The trial court dismissed the removed state criminal contempt proceedings and initially granted a preliminary injunction against the use by the federal officials of the illegally obtained

evidence. However, when the case came on for final hearing, the trial court dismissed the other two complaints as well, primarily on the authority of Brittingham v. C.I.R., 451 F.2d 315 (5th Cir. 1971). The trial court noted that the question whether the evidence obtained from the illegal search by the state officers could be used in the civil tax proceeding which had been instituted on behalf of the federal agents upon having received access to the documents taken from Suarez's office could be determined in the Tax Court upon proper motion being made by the taxpayer.

The trial court dismissed the claim for damages against the state officials on the ground that any action against them was barred by the three-year statute of limitations. The court also found that there was no personal liability on the part of the federal officers, because, unlike the case in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) there was no unconstitutional activity undertaken by the agents themselves, but rather they were operating solely within their official capacity. The court held further that the Federal Tort Claims Act did not waive sovereign immunity because it expressly provides that its waiver of immunity was not applicable to claims arising out of the assessment or collection of a tax.

As contemplated by the district court, the Tax Court, upon motion duly made by the taxpayer, held in a well-considered opinion that the evidence obtained by virtue of the illegal raid could not be utilized in the civil tax case against Sua-

rez. It held that the concession by the Commissioner that his determination of some $700,000 of tax deficiency was based solely upon the illegally seized records destroyed the presumption of correctness of the determination. A decision was therefore entered in favor of the taxpayer. Suarez v. Commissioner, 58 T.C. No. 78 (Filed Aug. 10, 1972.) Although notice of appeal was filed by the Commissioner in the tax case, the appeal was subsequently dismissed by stipulation. Thus, Dr. Suarez's original complaint, which had as its purpose the prevention of the use by the IRS agents of the illegally obtained evidence in a tax case against him, was mooted. There is therefore nothing left on the merits of the original three complaints which were dismissed by the trial court, and which are on appeal here now.

However, Dr. Suarez contends that the effort and delay and concern which he suffered before finally prevailing on the principal issue warrants his recovering an attorney's fee against the federal officials. He claimed against the state officials as well, but it is clear that any claim against them, even if otherwise permissible, cf., Named Individual Members San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017, 1026 (5th Cir. 1974) would be barred by the statute of limitations.

We can find no basis on which attorney's fees could be allowed in this kind of action against the federal officials. In fact, as pointed out in the San Antonio case just cited we noted that the

parties there conceded that the federal defendants are immunized from an award of attorney's fees by provisions of 28 U.S.C. §2412.[1]

As we have stated, the injunction issue has been mooted by the action of the Tax Court, taken following the decision of the district court in these cases. In such circumstances there is nothing left to be tried. The appeal must therefore be dismissed.

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[1]This section provides as follows:

§2412. Costs.

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507, §1, 89 Stat. 308.

QUESTIONS PRESENTED

I.

WHETHER RESPONDENT DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, CAN BE HELD LIABLE UNDER CIVIL RIGHTS OR OTHER FEDERAL STATUTES FOR ACTS COMMITTED IN THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS?

II.

WHETHER THE MONEY CLAIMS AGAINST RESPONDENT DADE COUNTY OFFICIALS WERE BARRED BY FLORIDA STATUTES OF LIMITATION IN THE ABSENCE OF ANY STATED LIMITATIONS PERIOD IN THE FEDERAL CIVIL RIGHTS ACTS?

III.

WHETHER PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES OR COSTS ON ANY OTHER BASIS IN THIS CAUSE?

POINT I

WHETHER RESPONDENT DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, CAN BE HELD LIABLE UNDER CIVIL RIGHTS OR OTHER FEDERAL STATUTES FOR ACTS COMMITTED IN THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS?

The Trial Court dismissed Counts III and IV of the Amended Complaint as to Dade County on the ground that acts committed by that governmental entity in the performance of its governmental functions did not constitute a cause of action for money damages under the Civil Rights Acts. Such dismissal was correctly based upon *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Mayhue v. City of Plantation*, 375 F.2d 447 (5th Cir. 1967); *Hill v. City of El Paso*, 437 F.2d 352 (5th Cir. 1971); and *Mareno v. Henckle*, 431 F.2d 1299 (5th Cir. 1970).

Since the issuance of the Trial Court's order, the point of law upon which the Court relied has been reinforced by such cases as *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Yumick v. Cotter*, 452 F.2d 59 (7th Cir. 1971); *Collins v. State of Florida*, 432 F.2d 60 (5th Cir. 1970); and *Via v. Cliff*, 470 F.2d 271 (3rd Cir. 1972). In the *Moor* case this Court painstakingly traced the history of Sec. 1983, U.S.C.A., and found there were no exceptions which could be used as a basis of claim for money damages against either counties or municipalities.

POINT II

WHETHER THE MONEY CLAIMS AGAINST RESPONDENT DADE COUNTY OFFICIALS WERE BARRED BY FLORIDA STATUTES OF LIMITATION IN THE ABSENCE OF ANY STATED LIMITATIONS PERIOD IN THE FEDERAL CIVIL RIGHTS ACTS?

The language of the Trial Court's opinion on this point reads:

> With respect to the individually named defendants under Count III, the action must also be dismissed. Count III is founded upon the Civil Rights Statutes and upon claims for deprivation of plaintiffs' constitutional rights based upon the Supreme Court's recognition of such a claim in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The actions of defendants for which damages are sought occurred on January 3, 1964, more than six years prior to the institution of the present action. It is well recognized that because no statute of limitations is specified in the Civil Rights Statutes (which are part of the basis for plaintiffs' claim here) the applicable state limitation periods should be adopted. Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). The Fifth Circuit has interpreted the Civil Rights Statutes as falling within the three-year limitation period under F.S. §95.11(5)(a). Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970). Even if this action were

> deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.
>
> Plaintiffs' claims under Count III are, however, founded upon a Bivens claim aside from the Civil Rights Statutes. The Supreme Court when it recognized the existence of a claim founded upon a constitutional deprivation in Bivens did not reach the issue of limitation of that form of action. In the absence of any authority from either the Supreme Court, or the Fifth Circuit, this Court is of the opinion that the claim under Bivens should, by analogy to the Civil Rights Statutes, borrow the state statute of limitations applicable under Nevels v. Wilson, supra. Count III must also be barred under either the three- or four-year Florida Statute, F.S. §95.11, and is therefore dismissed.

Petitioners grasp at the *Janis* (*United States v. Janis*, Case No. 74-958) straw like drowning men and contend that this case is a "Bivens" type of action and therefore somehow distinguishable. Respondent County Officials would point out that the *Bivens* action pertained only to Federal officials (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). However, even if a *Bivens* type claim is available against state and local officials, there are no stated periods of limitation applicable to federal civil actions prosecuted under *Bivens* or the Civil Rights Acts. Petitioners in such circumstances contend that the Federal Courts should now create a limitations period by decree which would permit them (the Suarezes) to obtain the relief they wish retro-

actively. Your Respondents contend to the contrary and maintain that, when there is no federally legislated period of limitation, the applicable state statute of limitations must be applied. This position is buttressed on the realization that, if utter chaos is to be avoided, some limitations period must accompany every legal remedy created for the benefit of citizens.

It is well settled in the Fifth Circuit as well as other circuits that a statute of limitations is not tolled by a plaintiff's incarceration. *Knowles v. Carson*, 419 F.2d 369 (5th Cir. 1969); *Campbell v. Weatherford*, 427 F.2d 131 (5th Cir. 1970); *Henig v. Odorioso*, 256 F.Supp. 276 (E.D.Pa.1966), *aff'd.* 385 F.2d 491 (3rd Cir. 1967), *cert. den.*, 390 U.S. 1016 (1968), *reh. den.*, 391 U.S. 929 (1968).

Similarly, on the question of whether the accrual of a civil rights action for an allegedly impermissible search is postponed until the validity of the search and seizures has been adjudicated, there is a Ninth Circuit case directly on point. In *Strung v. Anderson*, 452 F.2d 632 (9th Cir. 1971), the Court held that the accrual of a civil rights action based on an allegedly impermissible search was *not* postponed until the validity of the search and seizure had been adjudicated.

Thus, Respondent County Officials believe that they have shown that the Florida statute of limitations is an absolute bar to the suit of Petitioners, and the limitation period was not tolled by incarceration or any other factor in this cause.

POINT III

WHETHER PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES OR COSTS ON ANY OTHER BASIS IN THIS CAUSE?

The final paragraph on page 27 of the Petition for Writ of Certiorari makes it evident that Petitioners have limited their claim to attorneys' fees and costs. This being so, it would appear that their petition for relief in this regard should have been addressed to the Tax Court, a forum in which they were successful, rather than to the Federal District Court where the first four counts of their complaint were dismissed.

Further, Rule 9 of the Federal Rules of Civil Procedure requires:

> "When items of special damages are claimed, they shall be specifically stated."

The Petitioners, having failed to specifically claim attorneys' fees in their complaint or amended complaint, are now barred from asserting a claim for such relief at this juncture of the proceedings.

CONCLUSION

For the reasons stated above and for the reasons so clearly articulated by the Court in the recent case of *Alyeska Pipeline Service Co. v. Wilderness Society*, ____U.S.____, 44 L.Ed.2d 141, 95 S.Ct.____ (1975), your Respondents ask that the writ herein sought be denied.

Respectfully submitted,

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STUART L. SIMON
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ROBERT A. GINSBURG

By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 25th day of August, 1975, to: Office of Attorney General, The Capitol, Tallahassee, Florida; Scott P. Crampton, Assistant Attorney General, Department of Justice, Tax Division, Washington, D.C. 20530; Clemens Haggland, Esquire, Assistant United States Attorney, 300 Ainsley Building, Miami, Florida; John S. Lloyd, Esquire, City Attorney, 65 S.W. First Street, Miami, Florida 33130; and Stanley Jay Bartel, Noriega & Bartel, P.A., 2100 First Federal Building, One S.E. 3rd Avenue, Miami, Florida 33131.

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